MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Proposed Collection

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Merit Systems Protection Board (MSPB) request for a three-year reinstatement of its expired Generic Clearance Request for Voluntary Customer Surveys under Executive Order 12862, ''Setting Customer Service Standards,'' has been forwarded to the Office of Management and Budget (OMB) for review and comment. The original approval for this information collection was provided by OMB on February 28, 1994, as a three-year generic clearance request for voluntary customer surveys under Executive Order 12862, ''Setting Customer Service Standards,'' and in accord with 44 U.S.C. 3506. Surveys under this approval are assigned OMB Control Number 3124–0012. That approval expired on February 28, 1997. A limited-term approval from OMB reinstated that authority through April 30, 2001.

In this regard, we are soliciting comments on the public reporting burden. The reporting burden for the collection of information on this form is estimated to vary from 10 minutes to 30 minutes per response, with an average of 15 minutes, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Estimated Annual Reporting Burden

5 CFR section	Annual number of respondents	Frequency per response	Total annual responses	Hours per response (average)	Total hours
1201, 1208 and 1209	2,000	1	1,500	.25	375

Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to the address shown below. Please refer to OMB Control No. 3124–0012 in any correspondence.

DATES: Comments must be received on or before June 18, 2001.

ADDRESSES: Comments concerning the paperwork burden should be addressed to Mr. John Crum, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419, by e-mail to *john.crum@mspb.gov,* or by calling (202) 653–8900, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for MSPB, 725—17th Street NW., Washington, DC 20503.

Dated: May 14, 2001.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 01–12499 Filed 5–17–01; 8:45 am]

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MERIT SYSTEMS PROTECTION BOARD

Opportunity To File Amicus Briefs in Cassandra Augustine v. Department of Veterans Affairs, MSPB Docket Number SF–3443–00–0085–I–1

AGENCY: Merit Systems Protection Board (MSPB).

ACTION: The Merit Systems Protection Board is providing interested parties with an Opportunity to submit amicus briefs in the above-referenced appeal. The issues to be addressed in such briefs are set forth in the Board's May 14, 2001, opinion and order, which is reprinted in its entirety in the summary below.

SUMMARY: The Department of Veterans Affairs (DVA) petitions for review of the initial decision which found that it violated the appellant's veterans' preference rights. The Office of Personnel Management (OPM) has intervened in support of DVA's petition for review. For the reasons set forth below, we VACATE the initial decision, REOPEN the record, and ORDER presentation of further argument and evidence. We also invite interested parties to submit briefs amicus curiae on the issues discussed in this decision.

Background

The appellant, a veteran with a 30% service-connected disability, applied for the position of Veterans Service Representative (VSR), GS–996–7, with the DVA. Initial Appeal File (IAF), Tab 8, Subtab 2 at 3, 20, 23. The vacancy announcement listed nine locations, and indicated that there were ''[o]ne or more positions at each location.'' The announcement also stated that the candidates would be ''rated'' and ''rank[ed]'' according to how well their knowledge, skills, and abilities ''matche[d] * * * the requirements identified for the position.'' In addition, the announcement indicated that individuals who met one of the following ''recruitment categories'' could apply: ''Outstanding Scholar''; ''Veterans Readjustment Act (VRA) eligibles''; ''30% or more disabled veterans''; ''Preference Eligibles'' and veterans honorably discharged after 3 or more years of active military duty; ''Chapter 31 veterans''; ''Handicapped Eligibles''; and ''VA CTAP or Interagency CTAP Eligibles.'' The announcement further stated, however, that ''first consideration'' would be given to ''[i]nternal candidates'' who applied under DVA's ''Merit Promotion'' plan. Id., Subtab 1 at 1–3.

DVA, which holds delegated authority from OPM to examine candidates, generated seven certificates, each corresponding to one of the recruitment categories listed in the vacancy announcement. The appellant's name appeared on the 30% or more disabled veteran certificate and the VRA certificate. Although the appellant qualified as a preference eligible pursuant to 5 U.S.C. 2108(3)(C), the agency did not include her name on the certificate of ''Preference Eligibles'' and veterans honorably discharged after 3 or more years of active military duty. DVA did not rank any of the candidates. Ultimately it filled nine positions, selecting five individuals from the 30% or more disabled veteran certificate, three individuals from the Outstanding Scholar certificate (none of whom were preference eligible), and one individual from the certificate of ''Preference Eligibles'' and veterans honorably discharged after 3 or more years of active military duty. The record indicates that the individual selected from the final certificate was preference eligible pursuant to 5 U.S.C. 2108(3)(E) as the spouse of a service-connected disabled veteran. Although the initial decision indicates that the agency did not treat this candidate as a preference eligible, IAF, Tab 11 at 4, the certificate on which this candidate's name appeared clearly indicated that she was entitled to 10 veterans preference points, IAF, Tab 8, Subtab 3 at 9. IAF,

Tab 8, Subtab 3 at 9–10; Petition for Review (PFR) File, Tab 3. DVA found the appellant qualified for the position but did not select her. IAF, Tab 8, Subtab 3 at 1–5, Subtab 5.

The appellant filed a complaint with the Department of Labor (DoL) claiming that her veterans' preference rights had been violated. After an investigation, DoL notified the appellant that her claim did ''not have merit.'' IAF, Tab 8, Subtab 9. The appellant then filed this timely appeal. Id., Tab 1; see 5 U.S.C. 3330a(d). The administrative judge, after considering argument and documentary evidence from the parties (the appellant did not request a hearing, IAF, Tab 1 at 7), held that DVA violated the appellant's veterans' preference rights at 5 U.S.C. 3318 by ''passing [her] over'' in favor of non-veterans without seeking and obtaining OPM's approval. He further held that DVA's ''practice of issuing multiple certificates'' corresponding to different recruitment categories ''and then selecting from them all at once, regardless of whether preference eligibles have been exhausted,'' had the effect of ''nullif[ying]'' the appellant's veterans'' preference. By way of relief, the administrative judge ordered DVA to appoint the appellant retroactive to the date she would have entered on duty had she been selected, to provide her with back pay, and to pay her an additional sum as damages. IAF, Tab 11.

DVA argues in its timely petition for review that the authority relied on by the administrative judge, 5 U.S.C. 3318, applies only to selections from ranked certificates, and that it was not required to rank candidates for the VSR position the appellant sought because it filled the position by ''internal agency merit promotion procedures.'' DVA further argues that by regulation, it has broad discretion in choosing how it fills positions. DVA argues, in the alternative, that the remedies ordered by the administrative judge are not authorized by statute. Petition for Review File (PRF), Tab 3. In response, the appellant argues, as she did below, that ''[c]ivil service law requires Federal examining offices to give job applicants numerical scores and to refer candidates for employment based on their scores.'' She further maintains that as part of this process, veterans preference rules mandate that the scores of preference eligibles be ''augment[ed].'' Id., Tab 4; see also IAF, Tab 9 at 8. Although labeled ''Cross Petition for Review,'' the appellant's response to the petition for review is not actually in the nature of a cross petition because the appellant does not argue that the initial decision contains an error. See *Hanner* v. *Department of the Army,* 62 M.S.P.R. 677, 680 n.2 (1994), aff'd, 48 F.3d 1236 (Fed. Cir. 1995) (Table).

OPM has intervened as a matter of right. PRF, Tab 7; see 5 U.S.C. 7701(d)(1). OPM argues that the authority relied on by the administrative judge, 5 U.S.C. 3318, applies only to ''competitive appointments,'' and that ''[h]ere, the agency filled the positions non-competitively.'' OPM further argues that agencies have ''wide discretion in selecting the method by which they make appointments,'' and that the seven recruitment categories used in this case, each of which represents a different ''hiring authorit[y],'' are all based on ''non-competitive procedures.'' OPM maintains that DVA was not required to rank the candidates. OPM argues, in the alternative, that even if there was a violation of the appellant's veterans' preference rights, the remedies ordered by the administrative judge are not authorized by statute. PRF, Tab 11. The appellant argues in response to OPM's brief that DVA was required to rank candidates, and that it was not permitted to segregate VRA-eligibles from other candidates. She also appears to contend that the remedies ordered by the administrative judge are authorized by statute. Id., Tab 12.

Analysis

The appellant has veterans' preference eligibility, she claims that her statutory veterans' preference rights were violated when DVA did not select her for the VSR position in 1999, and she has exhausted her remedy with DoL. Accordingly, her appeal is within the Board's jurisdiction under the Veterans Employment Opportunities Act (VEOA). See 5 U.S.C. 3330a(a), (d); see also *Smyth* v. *U.S. Postal Service*, 85 M.S.P.R. 549, ¶¶ 2 & 6 (2000) (VEOA creates a right of redress for actions taken after October 30, 1998 that are alleged to violate an individual's veterans' preference rights). The appellant appears to claim that irrespective of her veterans' preference rights, she was qualified for an Outstanding Scholar appointment. See IAF, Tab 9 at 3–4; PRF, Tab 12 at 7. This appeal, however, is limited to the question of whether the agency violated the appellant's veterans' preference rights. 5 U.S.C. 3330a(a). The Board lacks independent authority to enforce an individual's rights under the Outstanding Scholar program.

With the exception of certain high-level and specialized jobs that have no relevance here, positions in the federal civil service are either ''competitive'' or ''excepted.'' See 5 U.S.C. §2102, 2103. The parties have not addressed, and the vacancy announcement does not expressly state, whether the VSR position is in the competitive service. Nonetheless, the position is not listed in the comprehensive schedules of excepted-service positions published by OPM. See 5 CFR 213.3101–213.3302; 64 Fed. Reg. 48,461–48,464 (1999). Moreover, according to regulations and guidance issued by OPM, at least two of the recruitment categories listed in the vacancy announcement for the VSR position, VRA and Outstanding Scholar, are restricted to competitive-service positions. See 5 CFR 307.101(d); see also <http://www.opm.gov/employ/luevano.htm>. Finally, the SF–50 memorializing the appellant's appointment to the VSR position in compliance with the interim relief order unmistakably indicates that the position is in the competitive service. PRF, Tab 1, Ex. 1 at 2.

Having determined that the VSR position is in the competitive service, we now turn to how veterans' preference operates in hiring for competitive-service positions. Veterans' preference in this context takes two basic forms. First, by statute, agencies are permitted to appoint certain veterans non-competitively. For example, veterans with compensable service-connected disabilities of 30% or more may receive ''non-competitive appointment[s] leading to conversion to career or career-conditional employment.'' 5 U.S.C. 3112. To take another example, veterans of certain conflicts who meet specified education requirements are eligible for non-competitive ''excepted'' appointments at or below particular grades to positions ''otherwise'' in the competitive service. See 38 U.S.C. 4214; 5 CFR 307.104; Exec. Order No. 11,521, 35 FR 5311 (1970).

The second form that veterans' preference takes in hiring comes into play in the competitive examining process. An examination may consist of a written test, but it might instead consist of a work sample assessment, a structured interview, rating and ranking according to job-related competencies, verification of a professional certification recognized by a general professional community, or a combination of these or other formal evaluation devices. See Delegated Examining Operations Handbook, Office of Personnel Management (Oct. 1999), 2.2. In this decision we cite OPM's Delegated Examining Operations Handbook as general background and as evidence of what OPM's official guidance to employing agencies is. We make no finding on whether the Handbook or any part of it is consistent

with related statutes and regulations, whether it is entitled to deference, whether it was promulgated under or subject to notice-and-comment procedures, see 5 U.S.C. 553, or any other matter bearing on its validity. The appellant correctly points out that an integral part of the competitive examining process is the assignment of numerical scores, and then rating and ranking candidates according to those scores. PRF, Tab 4 at 2 (''[c]ivil service law requires Federal examining offices to give job applicants numerical scores and to refer candidates for employment based on their scores''); see also IAF, Tab 9 at 8. An examining authority, either OPM or an agency operating under a delegation of authority from OPM pursuant to 5 U.S.C. 1104(a)(2), ''shall assign numerical ratings'' to candidates. 5 CFR 337.101(a).

Under the Veterans' Preference Act, Pub. L. 359, ch. 287, 58 Stat. 390, as amended, preference-eligible veterans have additional points added to their passing scores on examinations. See 5 U.S.C. 3309; 5 CFR 337.101(b). The names of applicants who have qualified for appointment to the competitive service are entered onto registers, or ''lists of eligibles,'' in rank order, with preference eligibles ranked ahead of others with the same rating. See 5 U.S.C. 3313; 5 CFR 332.401. For positions other than scientific and professional positions in the grades of GS–9 or higher, disabled veterans who have a compensable service-connected disability of 10 percent or more are entered onto registers in order of their ratings ahead of all remaining applicants. See 5 U.S.C. 3313(2). An examining authority certifies ''enough names from the top of the appropriate register'' to permit the appointing authority ''to consider at least three names for appointment to each vacancy in the competitive service.'' 5 U.S.C. 3317(a). The appointing authority ''shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a).'' 5 U.S.C. 3318(a). If an appointing authority ''proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with (OPM) for passing over the preference eligible'' and obtain OPM's approval for the passover. 5 U.S.C. 3318(b)(1). In the case of a preference-eligible veteran with a 30% or more disability (such as the appellant), the veteran is entitled to notice of the proposed passover and an opportunity to respond to OPM. 5 U.S.C. 3318(b)(2). For appointments to vacancies in the excepted service in the executive branch, the nominating or appointing authority must select applicants in the same manner and under the same conditions required for the competitive service by 5 U.S.C. 3308–3318. See 5 U.S.C. 3320.

The administrative judge held that DVA violated the appellant's rights as a preference-eligible veteran under 5 U.S.C. 3318 when it selected non-preference eligibles without notifying the appellant and OPM that it proposed to pass her over. He further held that DVA's use of multiple certificates, and then its selection from them ''all at once,'' had the effect of ''nullif[ying]'' the appellant's veterans'' preference. DVA and OPM disagree, offering three different explanations for why DVA was permitted to use multiple certificates of unranked candidates. None of these explanations squares with the vacancy announcement itself, which expressly indicates that candidates would be rated and ranked. IAF, Tab 8, Subtab 1 at 3.

Before the administrative judge, DVA explained its actions by citing a regulation governing selection from unranked candidates for *excepted*-service positions. IAF, Tab 8 at 4 n.3 & Subtab 11 (relying on 5 CFR 302.401(a)). This regulation does not appear to have any application in this case, which concerns the selection process for a *competitive*-service position. However, as noted supra, ¶ 16 n.6, the individual selected from the certificate for ''Preference eligibles'' and veterans honorably discharged after 3 or more years of active military duty was appointed using a Schedule B excepted service appointing authority. The VEOA, as originally enacted, directed OPM to create a new appointing authority pursuant to 5 U.S.C. 3304(f). See Pub. L. 105–336, section 2, 112 Stat. 3182. OPM then announced a new Schedule B excepted appointing authority for appointments under the statute. See 63 FR 66,705 (1998) (codified at 5 CFR 213.3202(n) (1999)). Congress amended 5 U.S.C. 3304(f) in 1999, requiring that an individual hired under the new authority receive a career or career-conditional appointment. Pub. L. 106–117, § 511, 113 Stat. 1575 (codified at 5 U.S.C.A. 3304(f)(2) (West. Supp. 2000)). Thereafter, OPM announced that the Schedule B excepted appointing authority could no longer be used for new appointments after November 30, 1999, and that a new competitive appointing authority would replace it. See 65 FR 14,431 (2000) (to be codified at 5 CFR 315.611). In this case, the individual hired under the VEOA to the VSR position the appellant sought was appointed on or about August 2, 1999, under the then-existing Schedule B excepted authority. IAF, Tab 8, Subtab 3 at 9.

On review, DVA now contends that ranking of the candidates and recognition of veterans' preference was not required because it filled the positions by ''internal Agency merit promotion procedures.'' PRF, Tab 3 at 3. Based on the statutes cited above and an OPM regulation, it appears that promotion of a current employee—as opposed to a new appointment in the competitive service—does not require competitive examination. 5 CFR § 332.101(b) (''An examination for promotion, demotion, reassignment, transfer, or reinstatement may be a noncompetitive examination.''). Nonetheless, in this case DVA described the vacancy announcement in a letter to DoL as ''a solicitation for *new* employees who could join our roles (sic).'' IAF, Tab 8, Subtab 4 at 1 (emphasis supplied). Furthermore, the selection certificates indicate that outside candidates were considered. Id., Subtab 3 at 1, 3, 5, 7. Indeed, three of the selectees were hired under the Outstanding Scholar program; it appears that the order approving the consent decree that created that program and OPM's official guidance describing the program limit Outstanding Scholar appointments to *new* hires into the competitive service. See generally *Luevano* v. *Campbell,* 93 F.R.D. 68 (D.D.C. 1981); Delegated Examining Operations Handbook, § 2.8(A). In short, on this record we have no basis to conclude that DVA filled all nine of the VSR positions (or any of them, for that matter) by internal promotion.

OPM offers a third explanation for what happened: DVA exercised its discretion to fill the VSR position ''non-competitively.'' PRF, Tab 11 at 3. Five of the selectees in this case were appointed under a statute authorizing non-competitive appointment of a veteran with a 30% or greater service-connected disability; the statute is written in permissive terms, and its use appears to be committed to agency discretion. See 5 U.S.C. 3112 (''Under such regulations as the Office of Personnel Management shall prescribe, an agency may make a noncompetitive appointment leading to conversion to career or career-conditional employment of a disabled veteran who has a compensable service-connected disability of 30 percent or more.''). The sixth selectee was appointed from the certificate of preference eligibles and veterans honorably discharged after 3 or more years of active military duty; this appointment was made under 5 U.S.C.

3304(f), which at the relevant time OPM interpreted as allowing the non-competitive appointment of certain veterans under merit promotion procedures when an agency is accepting applications from outside its workforce. All indications are that use of this authority also was discretionary. The VEOA, as originally enacted, directed OPM to create a new appointing authority pursuant to 5 U.S.C. 3304(f). See Pub. L. 105–336, sec. 2, 112 Stat. 3182. OPM then announced a new Schedule B excepted appointing authority for appointments under the statute. See 63 FR 66,705 (1998) (codified at 5 CFR 213.3202(n) (1999)). Congress amended 5 USC 3304(f) in 1999, requiring that an individual hired under the new authority receive a career or career-conditional appointment. Pub. L. 106–117, sec. 511, 113 Stat. 1575 (codified at 5 U.S.C.A. 304(f)(2) (West. Supp. 2000)). Thereafter, OPM announced that the Schedule B excepted appointing authority could no longer be used for new appointments after November 30, 1999, and that a new competitive appointing authority would replace it. See 65 FR 14,431 (2000) (to be codified at 5 CFR § 315.611). In this case, the individual hired under the VEOA to the VSR position the appellant sought was appointed on or about August 2, 1999, under the then-existing Schedule B excepted authority. IAF, Tab 8, Subtab 3 at 9.

The remaining three selectees were appointed under the Outstanding Scholar program. This program was created in 1981 under a consent decree entered in a class action suit in which the plaintiffs alleged that OPM's competitive examination for entry into over 100 civil service occupations had a disparate impact on minority racial and ethnic groups. See Luevano, 93 F.R.D. at 73–74, 78–79. The GS–0996 job series covering the VSR position the appellant sought is covered by the decree. See Delegated Examining Operations Handbook, Appendix B. OPM's official guidance concerning the Outstanding Scholar program states as follows:

> Under the terms of the Luevano consent decree the Outstanding Scholar program was established as a supplement to the competitive examining process where under-representation of Blacks and Hispanics exists. This authority was not intended to replace competitive examining, nor to become the primary method of hiring. This authority allows agencies to appoint Outstanding Scholars [meeting specified college grade-point or class standing criteria] as an exception to normal competitive procedures, that is, the rule of three and veterans' preference do not apply.

Id., § 2.8(A).

OPM contends that DVA had the discretion to fill the VSR position under the Outstanding Scholar program instead of under competitive examination procedures. PRF, Tab 11 at 7. However, the only authority cited by OPM in support of this argument is the Luevano consent decree itself. Id. At this stage we are not convinced that the consent decree—an agreement between an executive agency and private parties approved by a district court judge—by itself is sufficient authority for an agency to choose not to use competitive examining, especially when a qualified veteran with statutory preference in such an examination applies for an announced vacancy. Indeed, in explaining why it interpreted the original version of VEOA as requiring a new excepted appointing authority under 5 U.S.C. 3304, see note 5 above, OPM stated that ''absent specific legislation or Executive order, OPM has no authority to permit the noncompetitive appointment of candidates in the competitive service.'' 65 FR 14,431 (2000). If this is so, then we would expect OPM to cite ''specific legislation or [an] Executive order'' as authority for the Outstanding Scholar program, but OPM does not cite any such source. OPM does argue that DVA's use of the Outstanding Scholar appointing method was authorized by 5 CFR 330.101, which states that ''[a]n appointing officer may fill a position in the competitive service by any of the methods authorized in this chapter.'' PRF, Tab 11 at 4. The current version of Chapter I, Title 5 CFR, contains three references to the Outstanding Scholar program, but none actually authorizes an appointment under that program; more important, OPM does not argue that these provisions are based on ''specific legislation or Executive order.'' See 5 CFR 315.710, 330.205(g), 330.705(b)(2). At one point Outstanding Scholar appointments were covered by a special Schedule B appointing authority at 5 CFR 213.3202. That authority, however, was an interim measure to be used while OPM developed an alternative competitive examining method for positions covered by the Luevano consent decree, which it ultimately did when it announced the Administrative Careers with America examination. The Schedule B hiring authority no longer covers Outstanding Scholars. See 57 FR 724 (1992); 54 FR 15,369 (1989); *National Treasury Employees Union* v. *Newman,* 768 F. Supp. 8, 9–10 (D.D.C. 1991).

To recapitulate, even if OPM's regulations authorize non-competitive hiring under the Outstanding Scholar program, OPM and DVA have not shown, or even argued, that Congress or the President approved the Outstanding Scholar program as an exception to competitive examining laws. Likewise, OPM and DVA have not shown, or even argued, that any statute or executive order delegates to OPM or any other executive agency the power to create a non-competitive appointing authority such as the Outstanding Scholar program. Finally, even if the Outstanding Scholar program was within OPM's or another executive agency's authority to create, OPM and DVA have not explained what rules, if any, guide its use, either in general, or when, as in this case, a qualified preference-eligible veteran vies for a position. In particular, the record does not show, with respect to the VSR position at issue, that DVA's use of the Outstanding Scholar program was consistent with OPM's requirement that the program be invoked ''as a *supplement* to the competitive examining process where under-representation of Blacks and Hispanics exists.'' Delegated Examining Operations Handbook, § 2.8(A) (emphasis supplied). It is undisputed that DVA did not conduct a competitive examination before selecting nine individuals for the VSR position the appellant sought; moreover, the record as currently developed does not indicate that DVA invoked the Outstanding Scholar appointing authority to ameliorate ''under-representation of Blacks and Hispanics.''

We are mindful of the important social goals of the civil rights laws under which the Luevano plaintiffs brought their suit. This case seeks redress for alleged violation of the veterans' preference provisions of the civil service laws. The government ''is obliged to abide by both [sets of] statutes, and may not satisfy one at the expense of the other.'' *National Treasury Employees Union* v. *Horner,* 654 F. Supp. 1159, 1166 n.5 (D.D.C. 1987), aff'd in part, rev'd in part on other grounds, 854 F.2d 490 (D.C. Cir. 1988). We must consider seriously the appellant's argument that DVA was not permitted to choose to hire non-veterans without competitive examination because of the primacy that competitive examination has in the civil service system, as discussed below.

The Pendleton Civil Service Act of 1883 replaced a patronage system, under which civil service appointments had frequently been used to reward political supporters, with a ''classified civil service,'' entry into which required competitive examination. See *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 106

(1976); *Arnett* v. *Kennedy,* 416 U.S. 134, 149 (1974). The ''fundamental'' idea underlying the Pendleton Act was that ''a new appointment'' in the civil service ''shall be given to the [person] who is best fitted to discharge the duties of the position, *and that such fitness shall be ascertained by open, fair, honest, impartial competitive examination.*'' *National Treasury Employees Union* v. *Horner,* 654 F. Supp. at 1161–62 (quoting S. Rep. No. 576, 47th Cong., 1st Sess., at 13–14 (1882) (emphasis supplied by court)). Nearly 100 years after the Pendleton Act, Congress reaffirmed the principle of fair and open competition for entry into the civil service. The Civil Service Reform Act of 1978 codified the ''merit system principles,'' the first of which states:

> Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, *after fair and open competition* which assures that all receive equal opportunity.

5 U.S.C. 2301(b)(1) (emphasis supplied).

Exceptions to the competitive examination requirement are permitted. See 5 U.S.C. 3304(b) (''[a]n individual may be appointed in the competitive service only if he has passed an examination'' or is appointed under an authority excepting him from the examination requirement); see also 5 U.S.C. 3302(2). For example, statutes such as those mentioned in ¶ 9 above authorize non-competitive appointment of veterans meeting certain criteria. Likewise, Civil Service Rules 1.3(c) and 7.1, first promulgated by the President in 1954 under 5 U.S.C. 3301, give an appointing officer the discretion to fill a position in the competitive service either by competitive examination or by non-competitive appointment of a former federal employee who acquired ''competitive status'' under a prior appointment. See Exec. Order No. 10,577 (Nov. 23, 1954), sec. 101, 19 FR 7521 (1954), reprinted at 5 U.S.C.A. 3301 note, currently codified at 5 CFR Part 1, §§ 1.3(c), 7.1; see also 5 CFR 212.301 (explaining how competitive status is acquired). Apart from the discretionary use of non-competitive appointing authorities, Civil Service Rule 3.2 allows appointment without competitive examination ''in rare cases,'' namely, when because of the ''duties or compensation'' of a position or the scarcity of ''qualified persons,'' the position ''cannot be filled through open competitive examination.'' 5 CFR Part 1, 3.2; see also 5 CFR 332.101(a) (OPM may authorize non-competitive examinations ''when sufficient competent persons do not compete''). The parties do not argue, and there is no evidence to indicate, that these exceptions to the competitive examining requirement were or could properly have been invoked with regard to the VSR position the appellant sought.

In light of the importance of the above questions to veterans and to class members in the Luevano litigation, we decline to rule on the merits of the appellant's claim without further briefing. A decision either way could profoundly affect one group or the other (or both), and as the above discussion indicates, thus far the issues have not been well-framed or discussed. Furthermore, it would be unwise for us to decide this case and potentially set precedent with just the appellant, DVA, and OPM in front of us, considering that individuals, veterans' groups, Luevano class members, unions, minority advocacy groups, and other government agencies, have a large stake in the outcome.

Order

The initial decision's findings on the merits may or may not survive review, and in any event, OPM and DVA make strong arguments that the remedy ordered in the initial decision exceeds the Board's authority. Accordingly, we VACATE the initial decision, without deciding the propriety of the remedy ordered below. We will revisit the issue of the appropriate remedy if, after further briefing, we conclude that DVA violated the appellant's veterans' preference rights.

The record is reopened for presentation of supplemental argument and evidence on the following related questions: (1) Was the execution of the Luevano consent decree a valid exercise of delegated executive authority for necessary exceptions of positions from the competitive service or necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of Title 5, United States Code; (2) what rules govern the use of the Outstanding Scholar appointing method, both in general, and when, as in this case, a qualified individual with veterans' preference applies for a competitive-service position; (3) when a qualified individual with veterans' preference applies for a competitive-service position, is the appointing authority limited to filling the position through competitive examination or non-competitive appointment of a preference-eligible, or are there other means by which an appointing authority may fill the position, and if so, what are the other means; (4) does an agency with delegated examining authority have the discretion to issue multiple certificates of unranked candidates, grouped according to specific hiring authorities or criteria, for consideration by a selecting official; and (5) if the agency can issue multiple certificates based on specific criteria, and a candidate meets the criteria for inclusion on more than one such certificate, does the agency have the discretion to exclude a candidate from a certificate for which she meets the criteria? For example, in this case it appears that the agency excluded the 30% disabled veterans from the VEOA certificate despite the fact that each of these veterans was eligible to compete pursuant to the VEOA. See supra, ¶3. The supplemental argument addressing question (1)–(3) should focus on the matters discussed in ¶¶ 17–19 of this opinion, although the parties are not limited to those matters.

Within 30 days of the date of this order, OPM and DVA shall submit (individually or jointly) legal argument on the questions posed above. OPM and DVA shall also submit (individually or jointly) copies of the full Luevano consent decree and DVA's merit promotion plan. In addition, DVA shall submit, no later than 15 days from the date OPM files its response to this order, supplemental evidence and argument showing that the appointments it made under the Outstanding Scholar program met the requirements of that program as explained in OPM's response.

The appellant may reply within 30 days of the date of service of OPM's and DVA's legal argument and evidence. (If OPM and DVA do not make service on the same date, the appellant's response is due no later than 30 days from the later date of service.) The appellant may supplement her reply, no later than 15 days from the date DVA files its supplemental evidence and argument, with regard to whether the Outstanding Scholar appointees met the terms of that program.

The Clerk is directed to cause this decision to be printed in the **Federal Register**, and to advise any interested party that it may submit an amicus brief on the questions posed above, within 30 days of the date of publication. The notice shall instruct amici to file two copies of their briefs with the Clerk of the Board, and shall include instructions for service of briefs on DVA and OPM. The Clerk will serve copies of amicus briefs on the appellant.

DVA, OPM, and the appellant may respond to any amicus briefs filed within 20 days from the latest date an amicus brief is served, but in any case no later than 60 days from the date of

publication of the notice in the **Federal Register**.

DATES: All briefs in response to this notice shall be filed with the Clerk of the Board within 30 days of May 18, 2001.

ADDRESSES: All briefs submitted must include the case name and docket number noted above (Cassandra Augustine v. Department of Veterans Affairs, docket number SF–3443–00–0085–I–1) and be entitled ''Amicus Brief,'' and should be submitted in duplicate. Briefs should be filed with the Office of the Clerk, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419. A copy of any amicus brief that is submitted must also be served on Patricia Geffner, Department of Veterans Affairs, (344/02), Office of Regional Counsel, 11000 Wilshire Boulevard, Los Angeles, CA 90024, and Rafael Morell, Office of Personnel Management, Office of General Counsel, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Shannon McCarthy, Deputy Clerk of the Board, or Matthew Shannon, Counsel to the Clerk (202) 653–7200.

Dated: May 15, 2001.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 01–12627 Filed 5–17–01; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (01–060)]

NASA Advisory Council, Space Flight Advisory Committee (SFAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council, Space Flight Advisory Committee.

DATES: Friday, May 25, 2001 from 4 p.m. until 5 p.m.

ADDRESSES: National Aeronautics and Space Administration, 300 E Street, SW., Room 9H40, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Y. Edgington (Stacey), Code M, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–4519.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to seating capacity of the room. The agenda for the meeting is as follows:

–Shuttle upgrade review.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: May 15, 2001.

Beth M. McCormick,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 01–12536 Filed 5–17–01; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (01–061)]

NASA Advisory Council, Biological and Physical Research Advisory Committee, Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council, Biological and Physical Research Advisory Committee.

DATES: Thursday, June 14, 2001, 10 a.m. to 5 p.m.; and Friday, June 15, 2001, 8 a.m. to 12 Noon.

ADDRESSES: National Aeronautics and Space Administration Headquarters, 300 E Street, SW., MIC–7, Room 7H46, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Bradley M. Carpenter, Code UG, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–0826.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—OBPR Personnel & Organization Status
—ISS Status
—OBPR Performance Targets
—Division Director's Reports—Status
—Interim Mission Status Report
—Subcommittee Reports
—Discussion of Committee Findings and Recommendations

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: May 15, 2001.

Beth M. McCormick,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 01–12537 Filed 5–17–01; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Bioengineering and Environmental: Systems; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Bioengineering and Environmental Systems (1189).

Date/Time: June 7–8, 2001, 8 a.m.–5 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Arlington, VA.

Type of Meeting: Closed.

Contact Person: Michael Domach, Program Director, Division of Bioengineering and Environmental Systems, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone: (703) 292–7941.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: May 15, 2001.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 01–12590 Filed 5–17–01; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Biological Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Biological Sciences (1754).

Date/Time: June 13, 14, 15, 2001.

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford II—Room 525, 545, 565 and 575, Arlington, VA.

Type of Meeting: Closed.